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No. 73-1848

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

DORCAS BOND AND BARBARA BALDWIN, *Petitioners,*

v.

BENEFICIAL FINANCE COMPANY OF NEW YORK, INC., AND PROTECTIVE LOAN CORPORATION, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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July 1974

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OPINIONS BELOW

The opinion of the Court of Appeals (App. 62)[1] is reported at 494 F.2d 302. The opinion of the District Court for the Northern District of New York (App.

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[1] All references to the Appendix, "(App. —)," are to the Appendix to the Petition.

32) is reported at 362 F. Supp. 1373. An earlier opinion of the District Court is reported at 325 F. Supp. 1343.

QUESTIONS PRESENTED

The question decided by the Court of Appeals is whether the mere existence of a remedial statutory scheme governing the form, contents and enforceability of consensual wage assignment agreements means that any person attempting to enforce such an agreement according to its terms is thereby acting under color of state law so as to vest the federal courts with jurisdiction under the Civil Rights Acts to enjoin any such enforcement.

The petition does not state this question but states a question that the Court of Appeals did not reach because of its negative answer to the first question. The question stated in the petition is whether the enforcement of wage assignments in accordance with New York's wage assignment statutes deprives assignors of property without due process of law.

STATEMENT

The Facts and the Proceedings Below

Petitioners, who were plaintiffs and appellees below, executed wage assignment agreements to secure cash loans of less than $300 advanced to them by the respondent loan companies, which were defendants and appellants below. The assignment agreements complied on their face with all requirements of New York State law.

After petitioners failed to make payments on their loans as they came due, the respondent loan companies

exercised their rights under the agreements to notify petitioners and their employers of the defaults and of respondents' entitlement to receive 10 percent of petitioners' wages until the loans were repaid. None of petitioner Bond's wages were paid over to respondent Beneficial, but 10 percent of petitioner Baldwin's wages were paid over to respondent Protective for a short time.[2] Petitioners at no time availed themselves of their special statutory rights under Section 47-e of the Personal Property Law (App. 21) to seek a declaration of the invalidity of the wage assignment agreements.

On October 12, 1970, petitioners filed this action. They alleged that the statutory scheme permitting respondents to enforce the agreements according to their terms is invalid on its face, and that petitioners had thereby been deprived of due process of law. Though they alleged fraud and certain statutory violations on the respondents' part, none of these allegations (all were denied by respondents)[3] were ruled on by the District Court, which granted summary judgment for petitioners on constitutional grounds. The court held that Article 3-A of the New York Personal Property Law, §§ 46-49, constitutes a form of state action sufficient to give federal courts jurisdiction under 28 U.S.C. §§ 1343(3) and (4), and, proceeding under 42 U.S.C. § 1983, ruled that the challenged provisions deprived petitioners of property without due process of law.

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[2] After the commencement of this action, respondents by agreement in open court suspended all attempts to collect on the two wage assignments. 325 F. Supp. at 1345.

[3] See App. 78-79.

The Court of Appeals for the Second Circuit reversed. Holding that "there is no significant involvement of the State in the challenged conduct" (App. 79), the majority of the panel did not reach the question whether the petitioners suffered a denial of due process. Chief Judge Kaufman dissented.

The Statutory Scheme

The Court of Appeals found that:

> "[T]he statutory scheme under attack reveals not an offensive or insensitive attitude, but one of understanding and beneficence toward the borrower. The State has sought to preserve and to insure that the needy have recourse to legitimate outlets of credit." (App. 79.)

These conclusions well summarize New York's efforts, over many years, to shape a delicate legislative accommodation. The Assignment of Earnings Law has succeeded in providing an elaborate set of procedural safeguards for borrowers that stop short of so burdening the small loan transaction with restrictions as to make the lender's security interest in the borrower's wages impractical of realization. The law preserves the working person's common-law right to borrow on the security of his wages, which are often the only asset he has, and protects him against overreaching by lending institutions.

Wage assignments at common law were often the instrument of just such overreaching and abuse; many states have outlawed them. New York has declined to ban them but has placed them under statutory restrictions unknown to the common law. The Court of Appeals devoted a substantial part of its opinion to

an analysis of the protective provisions of the New York statutes governing the creation and enforcement of wage assignment agreements. (App. 70-73.) Thus, for instance, in petitioners' case the enforceability of wage assignment agreements depended on their receiving the principal amount of their loans at the time of the transaction;[4] lenders are forbidden by state law to require execution of a cognovit note;[5] assignment agreements must recite, and petitioners' agreements did recite, conspicuously and in two places that they are assignments of wages;[6] each agreement also recited, conformably to the statute, all the details of the transaction in a statement that must be permanently affixed to the agreement to put subsequent holders on notice, and the agreements also recited relevant provisions of the Personal Property Law;[7] the enforceability of petitioners' agreements depended on their actually receiving copies of the agreements;[8] and all transaction costs and interest rates were regulated by state law.[9]

Before respondents sought to enforce the agreements, they were bound to provide a grace period of at least 21 days from the initial default.[10] They had to place on file in appropriate county clerks' offices copies

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[4] Banking Law, § 356.

[5] Banking Law, § 353.

[6] Personal Property Law, § 46-c(a).

[7] Personal Property Law, § 46-c(b).

[8] Personal Property Law, § 46-e.

[9] Personal Property Law, § 46-f.

[10] Personal Property Law, § 48.

of the agreements [11] and notify the petitioners of their default by letter to their last addresses.[12] Ten days later, respondents could notify petitioners' employers of their rights in petitioners' wages, but the employers could deduct no wages until after another 10 days had passed.[13] The statute strictly limited to 10 percent of petitioners' payable earnings what could be deducted by petitioners' employers and paid over to respondents, and petitioners' employers could deduct wages for only one wage assignment or garnishment at a time.[14]

At any time during the life of the assignment agreements—including the statutory minimum of 41 days that must elapse between the initial default and the first wage deduction—petitioners could have moved in any New York court of record to vacate the assignments.[15] Motions to vacate are expedited proceedings, motion practice and discovery are permitted, and petitioners could have demanded a trial on the issues.[16]

The 1974 Amendments

After the Court of Appeals rendered its judgment, significant amendments to the Assignment of Earnings Law were enacted, substantially revamping those parts of the statute that are pertinent to petitioners' due

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[11] Personal Property Law, §§ 47, 47-a, 47-b.

[12] Personal Property Law, § 48.

[13] Personal Property Law, § 48-a(1).

[14] Personal Property Law, §§ 48-a(2), (3).

[15] Personal Property Law, § 47-e.

[16] New York Civil Practice Law and Rules (CPLR) §§ 405, 406, 408.

process challenge and strengthening the protections afforded borrowers.[17]

Some of these amendments clarify aspects of the legislative scheme that were the subject of differing interpretation in the courts below. Thus, for example, amended Section 47-e(5) (App. 27-28) specifically confirms that in proceedings to vacate wage assignment agreements courts shall have jurisdiction to consider any and all defenses and to grant interim relief.[18]

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[17] On June 8, 1974, the Governor of New York signed into law the amendments contained in App. 27-31, which were described in the petition as pending before the Governor; they constitute Chapter 753 of the 1974 Session Laws of New York. Also, on June 8, 1974, the Governor approved an amendment to § 46-c(b) of the Personal Property Law, which requires that the provisions of § 47-e be included in the statutory provisions recited on the face of an assignment agreement. (See Appendix to this Brief p. 1a.) On June 15, 1974, the Governor approved amendments increasing the amount of wages exempt from deduction by an employer under a wage assignment and protecting an employee from dismissal on account of the service of a wage assignment agreement upon his employer. (Appendix to this Brief pp. 1a-2a.)

[18] The challenged provisions of the Personal Property Law have never received an authoritative construction in the New York courts. Petitioners argued, for instance, that the pre-1974 § 47-e hearing would be inadequate because not all defenses could be asserted; the District Court surveyed the conflicting lower court cases on the issue [compare Mason v. Busch's Kredit Jewelry Co., 19 App. Div.2d 801, 243 N.Y.S.2d 248 (1st Dept. 1963), with Cajuste v. Budget Credit, Inc. 5 Misc.2d 948, 162 N.Y.S.2d 748 (Sup. 1957)] and held that "uncertainty" on this score was a ground for striking down the statute. (App. 54.)

Respondents argued before both courts below that the most appropriate course would have been to defer equitable jurisdiction pending an authoritative construction of the statute by the New York courts. Pending before the Supreme Court of the State of New York for Albany County is a suit in which respondents have sought a judgment declaratory of the meaning and the constitutionality of the challenged provisions. (App. 69 n.2.)

Amended Section 48(1) (App. 28) lengthens to 20 days the time that must elapse between the initial notice to a borrower of his default and the giving of notice to the borrower's employer. It also provides for alternative methods of service of the notice that guarantee that it will be received by the assignor. The notice is to be mailed by certified mail to the borrower's last known address; if returned undelivered from there, it is to be mailed by certified mail to the assignor at his place of employment or served upon him in the same way as a summons.

Amended Sections 48(3) and (4) (App. 29-30) require that such notice to the borrower clearly state the borrower's rights under the law (1) to initiate a Section 47-e proceeding, or (2) to send to the lender a simple notice asserting a bona fide defense to the lender's claim. If a Section 47-e proceeding is instituted, the court, under the amendments, can stay enforcement of the assignment and can hear all defenses; the burden of proving the assignment and the debt secured thereby is on the lender in such a proceeding. If the borrower chooses to send the notice of defense to the lender, the lender cannot enforce the assignment until it obtains a court order on at least eight days' notice to the borrower.

ARGUMENT

There is no reason for this Court to review the decision below. Any serious due process issue that may have been raised concerning the New York wage assignment law has been eliminated by the amendments just described. Under those amendments—whatever may have been the situation previously—an assignor of wages must be given notice and an opportunity to be heard on any defense he may have, in a proceeding

in which the assignee bears the burden of proof, before an assignment can be enforced. Such a regime satisfies the most exacting due process requirements of *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), and the other recent cases in which this Court has insisted that property not be taken before the owner or possessor is given notice and has the opportunity to be heard. Compare *Mitchell* v. *W.T. Grant Co.*, 94 Sup. Ct. 1895 (1974).

Thus, the state action question decided by the Court of Appeals is a question whose resolution would not affect the outcome of the case. In any event, the Court of Appeals was correct in deciding that, in the particular circumstances of the New York statutory scheme, respondents were not acting under color of state law when they sought to enforce against petitioners freely bargained wage assignment agreements. There can be no conflict among the circuits on that precise issue, and the decision below does not conflict with that of any other circuit in its rationale.

1. Petitioners urge the Court to grant the writ in order to consider wage assignments generally as "a problem of national importance." (Pet. 5-7.) That cannot be done. The Court can consider in this case only New York's wage assignment scheme. Other states may have quite different procedural requirements respecting wage assignments.

Moreover, the whole of the "national importance" discussion consists of unsupported, extra-record lawyers' statements. The gist of these statements is the assertion that after *Sniadach* wage assignments are being used by finance companies instead of wage garnishments "to circumvent the principle of *Sniadach*."

(Pet. 5-6.) That cannot be the case in states where the wage assignment has been abolished by law. And it cannot be the case in New York, where the wage assignment, restricted in order to protect the borrower, for many decades has been used by lenders and has served to ensure that wage earners can borrow money they need.[19]

Whatever the dimensions of any national wage assignment problem, wage assignments are not a problem of constitutional stature in New York. The recent amendments to the New York statute make crystal clear that wage assignments cannot be used to circumvent *Sniadach* but can be enforced only if procedures fully consistent with *Sniadach* are followed. Petitioners recognize that the 1974 amendments to the wage assignment statute do indeed alter the basis of their case, though their description of the amendments (Pet. 4-5) is incomplete and inexact. They suggest four reasons why, in spite of the amendments, the Court should hear this case. The reasons range from the frivolous to the unsubstantial.

First, petitioners say that the amendments do not apply to the wage assignments that respondents seek

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[19] Wage assignments until recently may have been very slightly more attractive than garnishments to New York lenders in some rare circumstances, quite apart from the strictures of *Sniadach*. One of the petitioners' original claims, which has not been pressed, was that the wage assignment statutes denied them the equal protection of the laws because the minimum weekly earnings below which there could be no garnishment were larger than the minimum weekly earnings from which wage assignments could be deducted. By Chapter 981 of the 1974 New York Session Laws (Appendix to this Brief pp. 1a-2a) the minimum earnings subject to assignment deductions have been raised to $85, the same as for garnishments.

to enforce against the petitioners. Asserting this as a reason for this Court's taking this case amounts to an invitation to the Court to pass constitutional judgment on a state statute that is being applied to two persons and will never be applied again. Even that invitation is not founded on fact. Respondents' agreement in open court, which has protected the petitioners against enforcement of the wage assignments throughout the pendency of this litigation, was to "lift and not further execute upon" the assignments. 325 F. Supp. at 1345. The assignments having been lifted, they cannot be enforced without following the new procedures for enforcement that will afford to petitioners the remedies available at the time of the attempted enforcement, which will include the remedies made available by the 1974 amendments. (The amendments become effective September 1, 1974, and this Court will not act on the petition until October.)

Second, petitioners say that the amendments do not apply to banks, trust companies and credit unions. The statement is not accurate. Banks, trust companies and credit unions are not obliged by the statute to file wage assignments with the County Clerk or to wait 21 days after default before sending a notice to the assignor. Pers. Prop. L. § 49, as amended (App. 30-31). In all other respects they are subject to the statute, including the amendments. Moreover, petitioners brought this suit against respondents, which are finance companies, to which unquestionably all the statutory restrictions apply. How the Court within its constitutional powers could rule on the validity of a state statute that governs parties and transactions other than the parties and transactions in litigation is not explained.

Third, petitioners point to what they consider a remaining defect in the statute despite the amendments. The amendments specify that the assignor can raise defenses in the special Section 47-e judicial proceeding and, under amended Section 48(3), assert them in his notification to the assignee (App. 27-28, 29-30). The petitioners read the statutory phrases "any and all defenses" in amended Section 47-e and "bona fide defense" in amended Section 48 narrowly, as not encompassing a partial defense that the amount owing is less than what is claimed. There is no basis for such a reading, and petitioners' counsel would certainly take and successfully maintain the contrary position in any actual proceeding under either of the amended statutory provisions. This groundless quibble is the worst that the petitioners have to say about the procedures under the amended statute.

Fourth, petitioners say that, even though the requirements of due process are satisfied by the amendments, this Court should review the state action decision of the Court of Appeals so that court can have the privilege of determining that petitioners' complaint should be dismissed on another ground. It is hard to imagine a more complete waste of the time and energy of this Court and the court below.

In sum, the amendments to the Assignment of Earnings Law wholly vitiate petitioners' challenge to provisions of that law. With the amendments, there is not the least doubt of the constitutionality of the statute. There is no reason for this Court to undertake to rule upon the constitutionality of the unamended statute, because that is an academic issue, and there is no issue at all under the amended statute.

2. Even if there remained a live, substantial and important due process issue, this Court should not

take the case because the anterior state action issue was correctly resolved by the court below and there is no conflict among the circuits. There is no decision by another circuit on the New York wage assignment scheme, or anything quite like it, but even if a wider net is cast for possible conflicts there is none. *Every* circuit that has considered the question has held that state laws that do no more than recognize the power of private persons to enter into consensual security agreements do not constitute "significant state involvement," and that therefore the person who enforces such an agreement is not the "State" for purposes of the Fourteenth Amendment itself and does not act "under color of any State law" for purposes of the Civil Rights Acts.[20] Moreover, the overwhelming weight of district court opinion on the issue is in accord with the judgment of the Court of Appeals in this case.[21]

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[20] Adams v. Southern California Nat'l Bank, 492 F. 2d 324 (9th Cir. 1973), pet. for cert. filed, June 7, 1974, No. 73-1842; Shirley v. State Nat'l Bank, 493 F. 2d 739 (2d Cir. 1974), rehearing denied, March 29, 1974; Nowlin v. Professional Auto Sales, Nos. 73-1348, 73-1450 (8th Cir., April 25, 1974), pet. for cert. filed, June 19, 1974, No. 73-1897; Bichel Optical Laboratories v. Marquette Nat'l Bank, 487 F.2d 906 (8th Cir. 1973); *Cf.* Fletcher v. Rhode Island Hospital Trust Nat'l Bank, No. 73-1372 (1st Cir., May 9, 1974).

[21] See, *e.g.*, Oller v. Bank of America, 342 F. Supp. 21 (N.D. Cal. 1972); Kirksey v. Theilig, 351 F. Supp. 727 (D. Colo. 1972); Pease v. Havelock Nat'l Bank, 351 F. Supp. 118 (D. Neb. 1972); McCormick v. First Nat'l Bank, 322 F. Supp. 604 (S.D. Fla. 1971); Johnson v. Associates Finance Co., 365 F. Supp. 1380 (S.D. Ill. 1973); Nichols v. Tower Grove Bank, 362 F. Supp. 374 (E.D. Mo. 1973); Sanderson v. Chrysler Credit Corp., Civ. No. 7517-73-H (S.D. Ala., July 17, 1973); Kinch v. Chrysler Credit Corp., 367 F. Supp. 436 (E.D. Tenn. 1973); Turner v. Impala Motors, Civ. No. C-73-50 (W.D. Tenn., June 15, 1973); Colvin v. AVCO Financial Services of Ogden, Inc., 12 U.C.C. Rep. 25 (D. Utah 1973).

Petitioners' citations of *Hall* v. *Garson,* 430 F.2d 430 (5th Cir. 1970), and several district court cases (Pet. 7-8) are entirely inapposite. Each of these cases involved a *statutory lien* created by the state for the benefit of creditors, and not a consensual security device created by agreement between private parties. The Second Circuit itself has recognized the important distinctions between statutory and consensual security devices and, while finding no state action here, has struck down certain statutory liens as violating due process. See *Hernandez* v. *European Auto Collision, Inc.,* 487 F.2d 378 (2nd Cir. 1973).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX

New York Session Laws, 1974, Chapter 767

Section 1. Subdivision (b) of section forty-six-c of the personal property law, as amended by chapter eight hundred twenty-three of the laws of nineteen hundred fifty, is hereby amended to read as follows:

(b) such assignment shall, either in its text or in a writing permanently attached thereto, identify specifically and describe fully the transaction to which it relates, said description to include the name and address of the assignee, the identity of the merchandise sold or services rendered or other basis of the indebtedness secured by, or consideration given for the assignment, and the date on and place at which payments are to be made; and on the face or back of the instrument there shall be a summary of sections forty-six-c, forty-six-e, forty-six-f, *forty-seven-e,* forty-eight, forty-eight-a, forty-eight-b, forty-eight-c and forty-nine of the personal property law;

§ 2 This act shall take effect September first, nineteen hundred seventy-four.

New York Session Laws, 1974, Chapter 981

Section 1. Section forty-eight-b of the personal property law, as added by chapter eight hundred twenty-three of the laws of nineteen hundred fifty, is hereby amended to read as follows:

§ 48-b. Amount of exempt earnings. Notwithstanding anything contained in this article, no portion of the assignor's future earnings shall be withheld by reason of any assignment, unless such earnings [amount at least to] *exceed* the sum of [thirty dollars per week if the assignor is employed in a city with a population of two hundred and fifty thousand or more, and at least to the sum of twenty-five dollars per week if the assignor is employed elsewhere] *eighty-five dollars per week.*

§ 2. Section three hundred fifty-six of the banking law is hereby amended by adding thereto a new subdivision, to be subdivision three, to read as follows:

3. Notwithstanding anything contained in this article, no portion of the borrower's future salary, wages, commissions, or other compensation for services shall be collectable from the employer or the borrower by the licensee, unless such salary, wages, commissions, or other compensation for services exceed the sum of eighty-five dollars per week.

§ 3. The title of section fifty-two hundred fifty-two of the civil practice law and rules and subdivision one thereof, as amended by chapter eleven hundred thirty-eight of the laws of nineteen hundred sixty-nine, is hereby amended to read as follows:

Dismissal or lay off of employee to avoid compliance with *wage assignment* or income execution. 1. No employer shall discharge or lay off an employee because [an] *one or more wage assignments* or income [execution] *executions* [has] *have* been served upon such employer against the [employees'] *employee's* wages.

§ 4. This act shall take effect on the first day of September next succeeding the date on which it shall have become a law.

(New language in italics. Omitted language in brackets.)